FUNG BENG TIAT

v.

MARID CONSTRUCTION CO.

FEDERAL COURT, KUALA LUMPUR
ANUAR ZAINAL ABIDIN CJ (MALAYA)
MOHD AZMI KAMARUDDIN FCJ
GOPAL SRI RAM JCA
[CIVIL SUIT NO: 02-354-1992]
24 APRIL 1996

BANKRUPTCY: *Judgment obtained against debtor - Bankruptcy notice obtained and served - Application to have debtor declared bankrupt - Notice of intention to oppose dismissed - Appeal - All these done at High Court, Kuala Lumpur - Debtor residing and operating business in Sabah - Whether application should have been brought in Sabah pursuant to r. 101 of the Bankruptcy Rules 1969 - Whether this is an irregularity curable by s. 131 Bankruptcy Act 1967 - Whether Court has power to transfer from High Court Malaya to High Court Borneo - Whether parties can consent or waive or condone on the issue of territorial jurisdiction of the Court*

This is an appeal against an order dismissing a notice of intention to oppose a bankruptcy petition. The creditor (or the respondent) had obtained judgment against the debtor and proceeded to obtain a bankruptcy notice which was duly served upon the debtor (or the appellant). As the debtor remained inactive, the creditor presented a petition to have the debtor adjudicated as a bankrupt. All of these were done at the High Court Kuala Lumpur. The debtor filed a notice of intention to oppose the petition. His intention to oppose was based on rule 101 of the Bankruptcy Rules 1969 which states that where a debtor has carried on business in one state for the greater part of the year preceding the bankruptcy petition, then the petition should be filed in that state. It was undisputed that the debtor was carrying on business and residing in Sabah.

The lower Court below, in dismissing the notice of intention to oppose, relied firstly on s. 5(1)(d) of the Bankruptcy Act 1967 which requires the debtor to be domiciled in the Federation. The lower Court was satisfied that as Sabah was part of the Federation, the petition was not wrongly filed. It was also held that in any event the case can always be transferred to Sabah at the discretion of the Court pursuant to s. 93(7) of the Act. The final statutory authority relied on by the lower Court in coming to its decision was s. 131 of the Act. By this section, any irregularity which does not cause substantial injustice, or where such injustice can be remedied, will not render the petition invalid. The lower Court was satisfied that there was no substantial injustice.

Emphasis was also placed on the fact that the debtor only raised the issue of jurisdiction at the third occassion. The lower Court held the fact that the debtor did not raise this issue earlier amounted to condonation of the irregularity.

The issue before the appellate Court was to decide if the debtor's opposition was rightfully dismissed.

Held:

Per Gopal Sri Ram JCA

[1] It has been unequivocally stated by article 121 of the Federal Constitution that there are two separate High Courts in Malaysia each of which exercises distinct territorial jurisdiction. One is the High Court in Malaya and the other is the High Court in Sabah and Sarawak. There is no provision in any Federal legislation allowing for the one High Court to transfer proceedings to the other.

[2] The cases relied on by the lower Court were dealing with transfers from one branch of the High Court in Malaya to another. Section 93(7) of the Act provides for transfers of this sort. The word 'State' appearing in s. 93(7) must be read in the light of the Federal Constitution and the Courts of Judicature Act 1964. There is no reported case where bankruptcy proceedings were transferred from the High Court in Malaya to the High Court in Sabah and Sarawak or the other way round.

[3] The territorial jurisdiction of a Court cannot be conferred by consent or waiver of any of the parties. Only the jurisdiction of the Court over a particular litigant may be affected by this. Therefore the doctrine of submission to jurisdiction has nothing to do whatsoever with the territorial authority of a Court. The learned Judge had erred by thinking otherwise.

[Appeal allowed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

***KEBANKRAPAN** Penghakiman diperolehi terhadap penghutang - Notis kebankrapan diperolehi dan disampaikan - Permohonan supaya penghutang diisytiharkan bankrap - Notis niat untuk membantah ditolak - Rayuan - Kesemua ini dilakukan di Mahkamah Tinggi, Kuala Lumpur - Penghutang bermastautin dan mengendalikan perniagaan di Sabah Samada permohonan seharusnya di mulakan di Sabah selaras dengan k. 101 Kaedah-kaedah Kebankrapan 1969 - Samada ini merupakan satu luar-aturan yang boleh dipulihkan oleh s. 131 Akta Kebankrapan 1967 - Samada Mahkamah mempunyai kuasa untuk memindahkan daripada Mahkamah Tinggi Malaya kepada Mahkamah Tinggi Borneo - Samada pihak-pihak boleh memberi kebenaran atau mengenepikan atau memaafkan atas isu bidangkuasa wilayah Mahkamah*

Ini merupakan rayuan terhadap perintah yang menolak notis niat untuk membantah petisyen kebankrapan. Pemiutang (atau responden) telah mendapatkan penghakiman terhadap penghutang dan kemudian meneruskan tindakan untuk mendapatkan notis kebankrapan yang mana telah disampaikan ke atas penghutang (atau perayu). Oleh kerana penghutang telah tidak bertindak, pemiutang telah mengemukakan petisyen supaya penghutang dapat diadjudikasikan sebagai seorang bankrap. Kesemua ini telah dilakukan di Mahkamah Tinggi, Kuala Lumpur. Penghutang telah memfailkan satu notis niat untuk membantah petisyen itu. Niat beliau untuk membantah adalah diasaskan pada kaedah 101 Kaedah-kaedah Kebankrapan, 1969 yang menyatakan bahawa di mana seseorang penghutang telah menjalankan perniagaan dalam sesebuah negeri bagi satu bahagian yang besar dalam sesuatu tahun sebelum petisyen kebankrapan, maka petisyen itu haruslah difailkan dalam negeri itu. Adalah tidak dipertikaikan bahawa penghutang telah menjalankan perniagaan dan bermastautin di Sabah.

Mahkamah di bawah dalam menolak notis niat untuk membantah, pertama-tamanya bergantung pada s. 5(1)(d) Akta Kebankrapan yang mana menghendaki supaya penghutang haruslah bermastautin di Persekutuan. Mahkamah di bawah berpuashati bahawa oleh kerana Sabah adalah sebahagian daripada Persekutuan, maka petisyen tersebut tidak difailkan secara salah. Adalah juga diputuskan bahawa dalam apa keadaanpun, kes itu boleh dipindahkan ke Sabah menurut budibicara Mahkamah selaras dengan s. 93(7) Akta tersebut. Autoriti berkanun muktamad yang digunapakai oleh Mahkamah di bawah dalam mencapai keputusannya adalah s. 131 Akta. Menurut seksyen ini, mana-mana luar-aturan yang tidak menyebabkan ketidak-adilan yang substansial atau di mana ketidak-adilan yang sedemikian boleh diremedikan, maka ianya tidak akan menjadikan petisyen itu tidak sah. Mahkamah di bawah berpuas hati bahawa tidak terdapat ketidak-adilan yang substansial.

Penekanan telah juga diletakkan pada fakta bahawa penghutang hanya membangkitkan isu bidangkuasa pada kali yang ketiga. Mahkamah di bawah memutuskan bahawa menurut hakikat bahawa penghutang tidak membangkitkan isu ini pada awalnya telah mebawa kepada pemaafan luar aturan itu.

Isu yang terdapat di hadapan Mahkamah Rayuan adalah untuk memutuskan jika bantahan penghutang telah ditolak dengan sahnya.

Diputuskan:

Oleh Gopal Sri Ram HMR

[1] Telah dinyatakan dengan jelas oleh perkara 121 Perlembagaan Persekutuan bahawa terdapat dua Mahkamah Tinggi yang berasingan di Malaysia yang setiap satunya melaksanakan bidangkuasa wilayah yang berlainan. Satu adalah Mahkamah Tinggi di Malaya sedangkan yang satu lagi pula adalah Mahkamah Tinggi di Sabah dan Sarawak. Tidak terdapat apa-apa peruntukan dalam mana-mana perundangan Persekutuan yang membenarkan Mahkamah Tinggi yang satu memindahkan prosiding-prosiding kepada Mahkamah yang satu lagi.

[2] Kes-kes kepada mana Mahkamah di bawah telah bergantung menguruskan pemindahan-pemindahan daripada satu cawangan Mahkamah Tinggi di Malaya kepada cawangannya yang lain. Seksyen 93(7) Akta memperuntukkan pemindakan seperti ini. Perkataan "State" yang terdapat dalam 93(7) mesti dibaca menurut Perlembagaan Persekutuan dan Akta Mahkamah Kehakiman 1964. Tidak terdapat kes-kes yang dilaporkan di mana prosiding-prosiding kebankrapan dipindahkan daripada Mahkamah Tinggi di Malaya kepada Mahkamah Tinggi di Sabah dan Sarawak atau sebaliknya pula.

[3] Bidangkuasa wilayah sesebuah Mahkamah tidak boleh dianugerahkan menurut persetujuan atau pengenepian mana-mana pihak tersebut. Hanya bidangkuasa Mahkamah atas sesuatu litigan boleh menjadi terjejas oleh perkara ini. Dengan itu doktrin menunduk kepada bidangkuasa tidak mempunyai apa-apa kaitan sama sekali dengan autoriti wilayah sesebuah Mahkamah. Hakim yang bijaksana adalah silap apabila memikirkan sebaliknya.

[Rayuan dibenarkan.]

Cases referred to:

Syarikat Nip Kui Cheong Timber Contractor v. Safety Life & General Insurance Co. Sdn. Bhd. [1975] 2 MLJ 115 ***(aff)***
Wee Chow Yong v. Public Finance Berhad [1990] CLJ 176 ***(dist)***
Dayasar Corp. Sdn. Bhd. v. C.P. Ng & Co. Sdn. Bhd. [1990] 1 CLJ 262 ***(aff)***

Legislations referred to:

Bankruptcy Act 1967, ss. 5(1)(d), 93(7), 131
Bankruptcy Rules 1969, r. 101(1), (2)
Federal Constitution, Art. 121

For the appellant - Richard Lee Wen Gee; M/s. Cheah Teh & Su
For the respondent - Chia Wen Chow; M/s. K.B. Chua & Co.

JUDGMENT

Gopal Sri Ram JCA:

This appeal raises a short but important point relating to the law governing personal insolvency. We heard this appeal on 22 April 1996, and, at the conclusion of arguments, allowed it. Our reasons for doing so now follow.

The relevant facts may be shortly stated, and we will, for convenience, refer to the respondent as "the creditor" and the appellant as "the debtor" respectively.

On 13 February 1990, the creditor obtained judgment against the debtor in the sum of RM337,812.25. Acting on this judgment, the creditor, on 18 March 1991, caused to be issued from the registry of the High Court at Kuala Lumpur, a bankruptcy notice for the judgment sum. That notice was duly served upon the debtor who made no response to it. By the terms of the Bankruptcy Act, 1967, which is the law governing personal insolvency, the debtor committed an act of bankruptcy. This entitled the creditor to present a petition to have the debtor adjudicated as a bankrupt.

On 10 June 1991, the creditor presented a petition against the debtor. Paragraph 1 of that petition reads as follows:

> That the said debtor is domiciled in the Federation or in any state or within one (1) year before the date of presentation of the petition has ordinarily resided in the State of Sabah and has an address for service at Malayan Banking Berhad Sandakan Branch, 48, Jalan Tiga, 90000 Sandakan Sabah.

On 8 July 1992, the debtor filed and served a notice of intention to oppose the petition. The petition came for hearing before a Judge on 17 July 1992. The debtor appeared by Counsel and resisted the petition. After hearing arguments, the learned Judge dismissed the notice to oppose and adjourned the petition to another date for hearing. It is against the order of dismissal that the present appeal has been brought.

In the Court below, Counsel for the debtor relied on r. 101 of the Bankruptcy Rules, 1969, sub-rules (1) and (2) of which read as follows:

> 101. (1) The petition shall be filed in the Court in which it is to be presented.
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> (2) Where the debtor has for the greater part of one year immediately preceding the presentation of the petition carried on business in one State and resided in another State the petition shall be filed in the Court of the State in which he has carried on business.

It is common ground that the debtor was, for the one year preceding the presentation of the petition not resident in Kuala Lumpur or in any other State within Peninsular Malaysia. He was in fact ordinarily resident in Sandakan, in

the State of Sabah during the relevant period. Based upon these undisputed facts, Counsel argued that the creditor ought to have presented his petition in the High Court in Sabah and not in the High Court in Malaya.

Counsel for the creditor argued that the petition had been properly presented before the High Court at Kuala Lumpur. He said that the debtor, by engaging Counsel in Kuala Lumpur, had submitted to the jurisdiction of the High Court in the capital city. He referred the learned Judge to ss. 5(1)(d), 93(7) and 131 of the Bankruptcy Act 1967 which provide as follows:

> 5. (1) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless:
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> (d) the debtor is domiciled in the Federation or in any State or within one year before the date of the presentation of the petition has ordinarily resided or had a dwelling house or place of business in the Federation or has carried on business in the Federation personally or by means of an agent or is or has been within the same period a member of a firm or partnership which has carried on business in the Federation by means of a partner or partners or an agent or manager.
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> 93. (7) Where the debtor is proved to be resident in a state other than the state in which a petition under this act is presented, the Court may upon application duly made in that behalf order the transfer of the proceedings to the Court of the state in which the debtor resides, at any time before or after the making of a receiving order against the debtor.
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> 131. No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of the Court.

Relying upon these provisions, Counsel for the creditor argued that it was open for his client to present its petition in any state within the Federation and that the proceedings could, after the making of the receiving and adjudication orders, be transferred to the state in which the debtor was resident. He also argued that s. 131 operated to save the petition in the instant case as the defect or irregularity, if any, did not occasion any injustice to the debtor.

These arguments found favour with the learned Judge who, after a consideration of the statutory provisions above-quoted, said:

> Since the judgment debtor is residing and carrying on business in Sabah one year before the presentation of the petition, he is therefore residing and carrying on business in the Federation. The judgment creditor was therefore entitled to file the bankruptcy petition against the debtor.

It is true that in the present case there has been a failure to comply with r. 101(1) and (2). In my opinion the failure to comply with r. 101(1) and (2) is only an irregularity and such irregularity does not cause substantial injustice to the judgment debtor.

Firstly when the creditor's petition came up for hearing on 7 February 1992, the debtor was represented by his Counsel. At the request of his Counsel the Court adjourned the matter to 17 April 1992, for mention pending the settlement of the matter. On 17 April 1992, he was again represented by his Counsel and at his request the matter was again adjourned pending settlement of the matter. On both occassions he did not raise any objections on the question of jurisdiction. It was only on 11 July 1992, that he filed the present notice of intention to oppose. It can be concluded therefore that the fact that his Counsel appeared on two previous occasions with the view of settling the matter, shows that, to borrow the words of the learned Judge in *Wee Chow Yong* case, [the reference here is to *Wee Chow Yong v. Public Finance Berhad* [1990] 1 CLJ 176; [1989] 3 MLJ 508] he had condoned the breach.

Secondly even if he had earlier raised an objection on the question of jurisdiction on the ground that there had been non-compliance with r. 101(1) and (2) the Court has the discretion either to transfer the case to Sabah before or after making a receiving order. The power of the Court to exercise its discretion as to whether to transfer the case to another state is provided in s. 93(7) of the Bankruptcy Act.

...

The word 'State' is not defined in the Bankruptcy Act. The Interpretation Act, 1967 defines 'State' to mean a State of Malaysia. It is clear, therefore, that under s. 93(7) the Court has the discretion to transfer a bankruptcy proceeding from the High Court in Malaya to the High Court in Borneo and *vice versa.*

In the light of the provisions in s. 93(7), any irregularity in a bankruptcy proceeding by reason of non-compliance with r. 101(1) and (2) cannot be said to cause substantial injustice to the judgment debtor. If the judgment debtor does not want the proceeding to be held in the High Court in Kuala Lumpur, he is at liberty to apply to the Court that the proceeding be transferred to Kota Kinabalu.

For the reasons given above, I dismiss the notice of intention to oppose the petition with costs.

Before us, Counsel for the debtor repeated the submissions made in the Court below. Having heard argument, we are, with respect, unable to agree with the learned Judge's reasons for dismissing the debtor's opposition.

First, it is crystal clear from article 121 of the Federal Constitution that there are two separate High Courts in Malaysia exercising distinct territorial jurisdiction over different geographical areas of the country. There is the High Court in Malaya and there is the High Court in Sabah and Sarawak. Each

has jurisdiction over disputes that arise within its territory. As presently advised, there is absent in any Federal Legislation that confers upon the one High Court to transfer proceedings to the other.

This bifurcation of territorial jurisdiction was dealt with by Hashim Yeop A Sani J (later Chief Justice, Malaya) in *Syarikat Nip Kui Cheong Timber Contractor v. Safety Life & General Insurance Co. Sdn. Bhd.* [1975] 2 MLJ 115. His Lordship observed that:

> [I]t is all too clear that both the High Court in Malaya and the High Court in Borneo have separate and distinctive territorial jurisdiction. Article 121(1) of the Constitution speaks of the two High Courts having 'co-ordinate jurisdiction' and the definition of 'local jurisdiction' in the Courts of Judicature Act, 1964 speaks of the territorial jurisdiction of each of the two High Courts. Section 7(2) of the 1964 Act should not be misconstrued for what that subsection does is simply to get around the provisions of O. 11 r. 1 of the Rules of the Supreme Court, 1957 for convenience for otherwise unnecessary difficulties will arise in the process of the Courts within Malaysia. The enactment of s. 7(2) of the 1964 Act itself would strengthen the argument that the framers of the 1964 Act recognised the distinctive territorial jurisdiction of the two High Courts in Malaysia.

Second, the cases referred to by the learned Judge in his judgment deal with petitions presented at one or more of the branches of the High Court in Malaya. There is no reported case - indeed Counsel on both sides conceded this - where bankruptcy proceedings were transferred from the High Court in Malaya to the High Court in Sabah and Sarawak or *vice versa*.

The expression "State" appearing in the Bankruptcy Act, 1967 must be interpreted in the light of the Federal Constitution and the Courts of Judicature Act, 1964. We are satisfied that there is nothing in the Act of 1967 or the Rules of 1969 that demonstrates an intention on the part of Parliament to create an exception in bankruptcy cases.

It follows, accordingly, that when s. 93(7) speaks of transferring proceedings from one state to another, it refers to a state within the territorial jurisdiction of the respective High Courts.

To illustrate, if a petition is presented in the High Court in Malaya at Penang to adjudicate a debtor bankrupt who has always been resident in Alor Setar, then, the former branch of the High Court has a discretion whether to transfer the proceedings to the High Court at Alor Setar or to deal with the petition itself. In the circumstances of the example given, it would be quite open for the former branch of the High Court to refuse a transfer on the ground that no injustice may be occasioned within the context of s. 131 of the Bankruptcy Act. Indeed this was the situation in *Wee Chow Yong (supra)*, which so impressed the learned Judge when he held against the debtor.

In our judgment, the learned Judge erred in failing to recognise the fact pattern before him as disclosing a point of territorial jurisdiction in the sense we have earlier discussed. Had he done so, he would have seen that s. 131 had no application to the case.

We pause to observe that Abu Mansor J in *Dayasar Corp. Sdn. Bhd. v. C.P. Ng & Co. Sdn. Bhd.* [1990] 1 CLJ 262; [1990] 1 MLJ 191 adopted the correct approach to the question of jurisdiction. Although that was a case which concerned corporate and not personal insolvency, the views there expressed are of relevance to the instant appeal. For present purposes, we find it sufficient to quote from the headnote of the report:

> The respondent company was incorporated on 1 September 1982 and had its registered office in Kuching, Sarawak. The petitioner alleged that the respondent was indebted to the petitioner in the sum of $107,357.66 for the price of goods sold and delivered. On 5 September 1988, the petitioner served on the respondent the statutory notice pursuant to s. 218 of the Companies Act 1965 but no payment was received. Hence the petitioner filed the petition to wind up.
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> Held, striking out the petition:
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> (1) The issue of which High Court has jurisdiction over a matter is determined by s. 23 of the Courts of Judicature Act 1964. It is clear that the respondent, residing in Kuching, would come under s. 23(1)(b) of the Courts of Judicature Act 1964.
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> (2) While matters can be heard in any Court of the Courts of Malaya, it was not the intention of the legislature for any Court in Malaya to assume jurisdiction of a matter arising in or which should be filed in a Borneo Court. Since the respondent is residing in Kuching, the matter should really be filed in the Borneo High Court, in particular Kuching.
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> (3) From the point of view of convenience, Kuching would be more convenient, with the respondent residing there and the witnesses being there.

Finally, we refer to the treatment by the learned Judge of the conduct of the debtor in relation to the issue of jurisdiction. In our judgment, the doctrine of submission to jurisdiction, which is really part and parcel of private international law, applies to jurisdiction that a Court has over a particular litigant and has nothing whatsoever to do with the territorial authority of a Court. The expression "jurisdiction" is one that takes its colour from its context, and, for that reason, great care must be taken in its use to the facts of a particular case.

The answer to the problem in the present case lies in the observation made by Mohd. Azmi FCJ during argument that once it is recognised that what was in issue was territorial jurisdiction, then, there could arise no question of a

submission. Jurisdiction in the sense in which it applies in the present case cannot be conferred by consent or waiver. The learned Judge was quite wrong when he thought otherwise.

For the reasons given, the appeal was allowed and the order of the learned Judge was set aside. The creditor's petition was struck out with liberty to file afresh in the High Court in Sabah. The costs of the appeal and of the proceedings in the Court below were awarded to the debtor. The deposit paid into Court as security for the appeal was ordered to be refunded to the debtor.

Reported by S. Dharmendran